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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 662

C. H. GUENTHER & SON, INC. d/b/a
PIONEER FLOUR MILLS, *Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD.
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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SUBJECT INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement of the case	3
A. The Board's findings of fact	3
B. The Board's conclusion and order	4
C. The decision of the Court of Appeals	4
Reasons for granting the writ	5
The equities	10
Conclusion	12
Appendix A.—Opinion of the United States Court of Appeals for the Fifth Circuit	Apdx. 2
Appendix B—Judgment of the United States Court of Appeals for the Fifth Circuit	Apdx. 9
Appendix C—Relevant Provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*)	Apdx. 10

TABLE OF AUTHORITIES CITED

American Machinery Corporation v. N.L.R.B., 424 F.2d 1321 (C.A. 5, April 15, 1970)	7
The Laidlaw Corporation, 171 NLRB No. 175, enf'd. 414 F.2d 99; cert. denied, 397 U.S. 920	7, 8, 11
Lodges 1746 and 743, I.A.M. v. N.L.R.B., 416 F.2d 809, cert. denied 396 U.S. 1058	6
N.L.R.B. v. Alva Allen Industries, Inc., 369 F.2d 210	5
N.L.R.B. v. Fleetwood Trailer Co., 389 U.S. 375	7, 8, 10, 11

	Page
N.L.R.B. v. Great Dane Trailers, 388 U.S. 26	10
Stoner Rubber Company, 123 NLRB 1440	5, 8
Titan Mill Mfg. Co., 135 NLRB 197	5

STATUTES.

28 U.S.C. 1254(1)	2
29 U.S.C. 152(3)	3
29 U.S.C. 158(a)(1)(3) and (5)	3
29 U.S.C. 159(a) and (c)(3)	3

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NATIONAL LABOR RELATIONS BOARD.
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

C. H. Guenther & Son, Inc. d/b/a Pioneer Flour Mills petitions for a writ of certiorari to review the judgment, decision and order of the Court of Appeals for the Fifth Circuit enforcing an order of the National Labor Relations Board requiring Petitioner to bargain with the union and award backpay to economic strikers.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is No. 27,495 of the Fifth Circuit Court of Appeals, decided June 1, 1970. Judgment was entered on June 23, 1970 (Appendix B). The findings of fact, conclusions of law, and order of the Board are reported at 174 NLRB No. 174.

JURISDICTION

The judgment of the Court of Appeals was entered on June 23, 1970. Jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

(1) Whether the Court's decision is valid that a former economic striker remains an employee for recognition purposes, whether he finds substantial employment or not, and a good faith doubt of majority status can never develop in a strike situation, even though all of the strikers have been permanently replaced.

(2) Whether the traditional good faith doubt doctrine of majority status, based on previously held valid reasons, can be removed by the Board's holding that recognition must be based on an absolute but arbitrary numerical count without an election although a majority of the strikers have been permanently replaced.

(A) Can the Board arbitrarily determine that permanently replaced strikers remain employees without a determination of their employment status or conditions at the time the determination is made?

(B) Whether permanently replaced former strikers who have abandoned the strike and obtained employment elsewhere continue as employees in perpetuity for majority status considerations.

(3) Whether replaced economic strikers continue as employees and have absolute reinstatement rights in perpetuity where jobs become available through creation of new positions or vacancies due to loss of strike replacements.

(4) Whether economic penalties may be levied against employers where there was full compliance with existing law at the time of the alleged discrimination.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*). Specifically, 29 U.S.C. 152(3), 29 U.S.C. 158(a)(1)(3) and (5); 159(a) and (c)(3). (See Appendix C.)

STATEMENT OF THE CASE

A. *The Board's Findings of Fact:*

The National Labor Relations Board found that Petitioner was engaged in a business affecting interstate commerce in production of flour and related products in San Antonio, Texas. The Union, the Brewery Workers Local Union No. 100, was a collective bargaining agent of Petitioner's production and maintenance employees. A collective bargaining agreement was in effect between the parties from October 1, 1964, to October 1, 1966. Prior to the expiration of this agreement, the parties, beginning in September 1966, attempted to negotiate a new agreement, and several sessions were held before the last bargaining session on January 19, 1967.

On October 3, 1966, during the negotiations, the Union went on strike. Of the approximately 96 employees in the certified unit, 79 supported the strike, 16 employees continued to work during the strike, and one employee was ill and died soon thereafter. The strike terminated about 7 a.m. on February 6, 1967, at which time an unconditional request was made by the Union on behalf of the strikers to return to work. Of the 79 employees who participated in the strike, 21 were recalled to work in February 1967. On February 14, Petitioner determined it had a complete work force and ceased recalling strikers, as there were no longer any vacancies. The Company, however, refused to continue recognition of the Union because it then had a *good faith doubt* of the continued majority status of the Union, as 46 employees had been hired as permanent replacements for the strikers during an economic strike situation. This 46, coupled with the 16 employees who did not strike, was clearly a majority of the original unit of 96 employees.

The Union filed unfair labor practice charges against the Company on February 27, 1967, with the Board alleging a refusal to bargain and failure to return strikers to work. After amendments of charges, a complaint was issued by the Board and a hearing held in September 1967. This hearing was continued and finally closed in January 1968.

B. *The Board's Conclusion and Order:*

The Board found that Petitioner had violated Section 8(a)(1) (3) and (5) of the National Labor Relations Act by refusing to reinstate strikers to work as their permanent replacements left their jobs and these jobs opened up and refusing continued recognition of the Union. The Board took a position, contra to all former case law, that replaced economic strikers continued as employees and had absolute right to reinstatement when new jobs were created or permanent replacements left existing jobs. The Board also found that Petitioner had illegally refused to bargain with the Union in February 1967 because there was no good faith doubt of continued majority. The Board in the past has held that permanent replacement of strikers created a good faith doubt. The Board held, for the first time in reversing former case law, that Section 9(c) of the Act must be applied to Section 8(a)(5) of the Act, and, therefore, all replaced economic strikers should be considered as members of the bargaining unit for majority purposes, regardless of their status as employees as set out in *N.L.R.B. v. Fleetwood Trailer Co.*, 389 U.S. 375.

C. *The Decision of the Court of Appeals:*

The United States Court of Appeals for the Fifth Circuit reviewed the Board Order under the authority of §10(f), Labor-Management Relations Act, 29 U.S.C. §160(f). It enforced all aspects of the Board Order and held further:

> As a result of this provision and the Supreme Court's *Fleetwood* decision, *Laidlaw* and our decision in *American Machinery* teach that permanently replaced strikers retain an expectation of future employment until they have surrendered their interests. Thus, it is appropriate to include them in the bargaining unit.

REASONS FOR GRANTING THE WRIT

We have no quarrel with Section 9(c)(3), for it clearly states that economic strikers have a right to vote in an election for a period of one year.

Section 9(c)(3) contemplates two things: first, that there will be an election; and, second, that some strikers have lost the right to reinstatement.

What the Board and the Courts have done is to say that because these former strikers have a right to vote and because they have a right to reinstatement in perpetuity, the employer can never, so long as there is a striker with such a right, refuse in good faith to recognize the union.

The effect of this holding is that 9(c)(3) can never apply because, if the employer can have no good faith doubt, there will never be an election; and, if there is no election, 9(c)(3) has no application.[1] This is contrary to the letter and spirit of the statute and contrary to all former case law.

The statute provides that Section 9 can control "elections," but the Board and the Courts have so applied Section 9(c)(3) as to render elections unavailable.

The law has been that an employer has the right to permanently replace an economic striker, and replacement of a majority of such strikers could furnish evidence to an employer of a good faith doubt of the union's continued majority status following an economic strike since replaced strikers were properly excluded from the bargaining unit because they were no longer employees. *Stoner Rubber Company*, 123 NLRB 1440; *Titan Mill Mfg. Co.*, 135 NLRB 197; *N.L.R.B.* v. *Alva Allen Industries, Inc.*, 369 F.2d 210 (8th Cir.).

This law was the valid and subsisting law under which Petitioner acted when it refused to bargain with the Union after the strike. The Board in this case drastically changed this law and has ordered Pioneer to bargain by virtue of rules made in this case for the first time.

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[1] Section 9(c)(3) merely determines that *strikers* (not former strikers) who are *not* eligible for reinstatement shall have a right to *vote*.

The Board has now for the first time in the instant case ruled that permanently replaced economic strikers must be counted, forever, by the employer as being in the bargaining unit in determining if the union represents a majority of the company's workers. The repercussions of such a new rule are obvious. For example, it ignores the fact that an employer may have a good faith doubt that the striker or former striker has ceased being an employee by virtue of equivalent employment elsewhere. Moreover, it gives all strikers a vested interest in their former jobs forever. Under this new rule, therefore, the Board has wrought an impossible situation. For example, if a company employed 100 workers and 99 workers struck and all 99 were permanently replaced, an employer could not have a good faith doubt of the union's majority status since the ratio of former represented employees to striker replacements is still 100 to 99, a clear majority for the union in the eyes of the Board.

This means that the company can never have a good faith doubt since the strikers have a right to their jobs forever. Thus, there can never be an election nor a good faith doubt because the question of representation can never be raised.[2]

The position of the Board and the Courts is that from this time on there must be a "mathematical certainty," without the possibility of an election, that the union has in fact suffered a loss of majority before the employer can legally refuse to bargain. There can be no mathematical certainty unless there is a valid secret ballot election conducted. Yet the Board will never conduct an election in the face of an unfair labor practice alleging a refusal to bargain by the union, nor will it permit the filing of a petition where there is no question of representation possible to be raised.

There is no answer but continued recognition of the union forever.

The latest pronouncement on this issue was *Lodges 1746 and 743, I.A.M.* v. *N.L.R.B.*, 416 F.2d 809 (C.A.D.C.), cert. denied 396 U.S. 1058. There the Court held:

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[2] An election may be held only where there is "a question concerning representation." Section 9(c)(1).

> Absent special circumstances, the union enjoys an irrebuttable presumption of majority status for one year after certification. Thereafter, the presumption continues but becomes rebuttable upon a showing of "sufficient evidence to cast serious doubt on the union's continued majority status." At that point, the burden shifts to the General Counsel to prove that, on the critical date, the union in fact represented a majority of the employees.
>
> * * * * *
>
> The pertinent standard, "serious doubt," has two components: a reasonable basis in fact, and good faith.

On December 18, 1967, this Honorable Court handed down its decision in *N.L.R.B.* v. *Fleetwood Trailer Company, Inc.*, 389 U.S. 375, holding that economic strikers had right to reinstatement to temporarily abolished jobs. This decision of this Court has been broadly extended by the NLRB and enforced by the courts to include right to reinstatement when new jobs are established or when striker replacements leave after the permanently replaced strikers have asked for reinstatement. This is not the holding of the *Fleetwood Trailer* case, as pointed out in the concurring opinion thereof. The Board established this exaggerated and extended doctrine in *The Laidlaw Corporation*, 171 NLRB No. 175, enf'd., *The Laidlaw Corporation* v. *N.L.R.B.* (C.A. 7, July 28, 1969), 414 F.2d 99; cert. denied, 1970, 397 U.S. 920. The United States Court of Appeals for the Fifth Circuit also upheld the *Laidlaw* principle in its review of the *Laidlaw* decision, *American Machinery Corporation* v. *N.L.R.B.* (C.A. 5, April 15, 1970), 424 F.2d 1321.

These cases misconstrue this Court's opinion in *Fleetwood Trailer Company, supra*, and extend this opinion to establish the revolutionary theory of law that replaced economic strikers continue their employee status forever, unless comparable employment is found, and must be sought out by the employer and given an opportunity to return with full reinstatement whenever new jobs are established or the old job or a similar job is vacated by the striker replacement. This is not the principle of *Fleetwood Trailer Com-*

pany; and the Board and Courts are in error in so construing this Court's decision. *Fleetwood Trailer Company* should not be considered beyond the facts of the case as pointed out by the concurring opinion. This Honorable Court should review the decisions of the Circuit Courts since *Fleetwood Trailer* and clarify and restrict the Circuit Courts' interpretation. This rule of law has not been laid to rest by this Court's denial of certiorari in *N.L.R.B.* v. *Laidlaw*, as the issues presented in that petition for certiorari are vastly different.

More than ten years after amendment of the statute, the Board decided in this case that replaced former economic strikers were still members of the bargaining unit for continued majority status purposes even though they may hold permanent jobs elsewhere. Prior to the Board decision here, both Board and Court law had clearly stated that if more than one-half of the unit was replaced by strike replacements or refused to go on strike, the employer would then have a good faith doubt of continued majority status. Accordingly, permanently replaced economic strikers were not to be considered as part of the bargaining unit when determining the union's majority. *Stoner Rubber Company, Inc.*, 123 NLRB 1440 (1959). As noted by the Court of Appeals, the Board continued this rule until its decision in this case. Here, the Board stated that it would apply to Section 8(a)(5), Section 9(c)(3) of the statute added by amendment in 1959. The latter section provides that:

> Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find consistent with the purposes and provisions of this Act in any election conducted within 12 months afer the commencement of the strike.

Section 8(a)(5) of the Act is the unfair labor practice section or refusal to bargain section of the statute. With this application, the Board reversed its *good faith doubt* of majority status and substituted therefor an absolute numerical count doctrine with its decision in this case.

It must be noted that the issue of refusal to bargain was sharply drawn by the union's filing of the charge of refusal to bargain against Petitioner on February 27, 1967. At this time, the Union elected to invoke Section 8(a)(5) of the statute, rather than proceed to an election under Section 9, where the strikers, as well as replacements, could vote to determine continued majority status. The Company, by its actions, had not placed in issue the absolute question of whether or not the union continued to represent the employees, but had merely stated by its actions that it *doubted* in good faith this continued majority status.

It is submitted that it is not the intention of Section 9(c)(3) in its amendment of 1959 to change and to obviate the good faith doubt issue in economic strike situations, but only to resolve the doubt and to permit all interested strikers an opportunity to *vote*. Under the Board's rule in this case, there can never be a good faith doubt of majority status. In this method, the Board, with the approval of the Court, has legislated meaning into Sections 8 and 9 of the Act which were not intended and have not been interpreted by this Honorable Court.

Section 8(a)(5) provides:

> Section 8(a) It shall be an unfair labor practice for an employer—(5) to refuse to bargain collectively with the representatives of his employees *subject to the provisions of Section 9(a)*. (Emphasis added.)

It is to be noted that Congress specified the particular subsection of Section 9 and did not include all subsections. Had it intended for Section 9(c) to apply it would have said so.

The Board, however, has undertaken to change that legislation to make Section 8(a)(5) subject to Section 9(c) also.

In amending the Act in 1959 and adding the new provision at Section 9(c)(3) pertaining to eligibility of economic strikers *who are not entitled to reinstatement*, Congress indicated clearly that it was aware that in certain situations economic strikers were *not* entitled to reinstatement as the Board and Courts had previously held. This may have been

because of permanent replacement or otherwise. In any event, Section 9(c)(3) applies to the representation procedures of the Board, but not to its preventive powers under Sections 8 and 10.

Fleetwood Trailer itself holds an economic striker to continue in an employee status and eligible for reinstatement unless there are justifiable and legitimate business reasons, one of which is permanent replacement.

Under the instant decision, the Board presumes to make its own numerical count, determining for itself whether an economic striker continues to be an employee, whether or not equivalent employment has been obtained by the striker, etc. Section 9(c)(3) applies to voting procedures and not to good faith doubt procedures. The one is numerical by *secret ballot*; the other is a philosophical guess. Before a determination can be made as to who is eligible to vote or who continues to be an employee, there need be an investigation to determine at the time whether or not an economic striker is eligible for reinstatement; and, under *Fleetwood*, whether the company has justifiable or business reasons for not reinstating the striker or whether the employee has found substantial and equivalent employment, in which case he would no longer be an employee or eligible to vote. In the instant matter, the Board has simply made an arbitrary and capricious determination. Section 9(c) applies to secret ballot voting procedures and not to a question as to whether a good faith doubt existed. We submit that all the circumstances and facts justified the Employer's doubt and its refusal to continue recognition of the Union absent a secret ballot election. Application of Section 9(c)(3) to the question of good faith doubt is a denial of the due processes of law. It thwarts not only the language of the statute, but the intent of Congress.

THE EQUITIES

The posture of Pioneer in this matter is exactly the same as Laidlaw as to notice of the holdings in the *Great Dane*,[3]

[3] *N.L.R.B.* v. *Great Dane Trailers*, 388 U.S. 26.

Fleetwood, and *Laidlaw* decisions. All of the cases were decided after the occurrences of February 6 to 18, 1967. By this time, Pioneer had determined its course according to existing law. Further, there is no anti-union motivation here as found in *Laidlaw*. Pioneer should not be penalized by high backpay awards because of changes in law after the fact.

If this Honorable Court intends to uphold the principles of *Laidlaw*, then Pioneer should be allowed to follow the opinion of this court from date thereof and Pioneer should not be penalized by backpay awards prior to the settlement of this question. This Honorable Court is again referred to the dissenting opinion of Judge Majors in *The Laidlaw Corporation* v. *N.L.R.B., supra,* where ample authority is set forth for this type of concession by this Honorable Court. See 414 F.2d 118. Further, Judge Majors states:

> Enforcement of the Board's order means from now on that an employer, when faced with the problem of his rights and obligations in a labor dispute, cannot safely rely on the advice of counsel, pronouncements of the Labor Board or court decisions for the law by which he should charter his course. Instead, he must be endowed with a power of prophecy sufficiently great to enable him to anticipate that the Board may change the law and make illegal that which was legal.

Surely, some equities must apply. Judge Majors recognized this, and would point up the fact that some balance must be struck: not a balance in the "deep pocket rule," but a balance of equity considering the "clean hands doctrine."

More important, however, is the imposition of a possibly unwanted union on the employees of the company. Under the facts of this case, the employees may be forever denied an opportunity for an election. The Board has said that it makes no difference that the strikers may no longer be employees, they having found substantial or equivalent employment as expressed in Section 2(3) of the Act; they are a part of the bargaining unit forever. It is to be noted that the Board did not apply Section 9(c)(3) to the effect

that the strikers shall be employees only for a year because Section 9(c)(3) states that a striker has the right only to *vote* for a year. The Board has found them to be employees in the bargaining unit; and, since they form a majority, there will never be a vote.

It is submitted that determinations in such circumstances made by the Board without facts or evidence and in direct misapplication of the statute deny the due process of law to your Petitioner and each of its employees.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED, Dallas, Texas, August 31, 1970.

Respectfully submitted,

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(Appendices follow)

APPENDICES

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 27495

C. H. GUENTHER & SON, INC.
d/b/a PIONEER FLOUR MILLS,
Petitioner-Cross Respondent,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent-Cross Petitioner.

Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board (Texas Case)

(June 1, 1970)

Before WISDOM, GOLDBERG, and INGRAHAM,
Circuit Judges.

WISDOM, Circuit Judge: This case is before the Court upon petition to review an order of the National Labor Relations Board issued against C. H. Guenther & Son, Inc., doing business as Pioneer Flour Mills in San Antonio, Texas, 174 N.L.R.B. No. 174 (1969). In its cross appeal, the Board was for full enforcement of its order.

The National Labor Relations Board found that the

Company violated Section 8(a) (5) and (1) of the National Labor Relations Act by refusing to recognize the Union, Brewery Workers Local Union 110, after an economic strike, and by refusing to furnish it with information relevant to the conduct of collective bargaining negotiations. The Board further found that the Company violated Section 8(a) (3) and (1) of the Act by discriminatorily refusing to reinstate strikers Wilburn, Samudio, and Woytasczyk at the end of the strike, by failing to recall 14 strikers when their jobs became available upon the departure of temporary or permanent replacements, and by discriminatorily reducing the seniority and other benefits of Robles and Villarreal after they were reinstated. (The Trial Examiner had not found an 8(a) (3) and (1) violation in the failure to recall 11 of the strikers because their replacements, although departed, had been "permanent.")

I.

An employer may not, upon termination of an economic strike, refuse to reinstate the strikers because of their participation in the strike. *Phelps Dodge Corp. v. NLRB*, 1941, 313 U.S. 177, 189; *NLRB v. Albritton Eng. Corp.*, 5 Cir. 1963, 340 F.2d 281, 283, *cert. denied*, 382 U.S. 815; *NLRB v. Marydale Products Co.*, 5 Cir. 1963, 311 F.2d 890, 891-892, *cert. denied*, 375 U.S. 817. It is also settled that although an employer may hire permanent replacements during the course of the strike in order to continue his business, and is not bound to discharge those replacements in order to create vacancies for strikers wishing to return to work, he may not resort to antiunion considerations in determining which of the strikers shall return to fill existing vacancies. *NLRB v. MacKay Radio & Tel. Co.*, 1938, 304 U.S. 333, 345-346.

Ample evidence supports the Board's finding that the Company refused to reinstate Wilburn, Samudio, and Woytasczyk upon termination of the strike for discrimina-

tory reasons, in violation of Section 8(a) (3) and (1) of the Act.

II.

Some of the replacements whom the Company hired during the strike began leaving shortly after the strike terminated. Although almost all of the strikers made unconditional requests for reinstatement, and although the Union made such an offer on behalf of all of the strikers and continued its efforts to obtain their reinstatement throughout the six months following the strike, the Company did not reinstate strikers to fill the jobs vacated by the replacements, but hired instead new employees who had never worked for the Company. The Board determined that 3 of the replacements had only been temporary, and that the remaining 11 had been permanent. It further determined that both temporarily and permanently replaced economic strikers are entitled to reinstatement upon the departure of their replacements, and therefore that the Company violated Section 8(a) (3) and (1) of the Act by hiring new employees, rather than strikers, to fill the vacancies left by the departure of the 14 replacements.

Economic strikers retain their employee status and are entitled to reinstatement upon the departure of their permanent replacements. *NLRB v. Fleetwood Trailer Co.*, 1967, 389 U.S. 375, 88 S.Ct. 543, 19 L.Ed.2d 614; *Laidlaw Corp. v. NLRB*, 7 Cir., 1969, 414 F.2d 99, *cert. denied*, 1970, U.S. [38 Law Week 3320, No. 1025]; *American Machinery Corp. v. NLRB*, 174 N.L.R.B. No. 25 (1969), *enforced* 5 Cir. 1970, F.2d [No. 27,283, April 15, 1970]. Substantial evidence supports the Board's finding that the eleven strikers in question wanted their jobs back, and the Company failed to meet its burden of establishing that there was a legitimate and serious reason for not reinstating these employees.

The Company had a 60-day training period for new employees. Three of the replacements hired during the course

of the strike failed to complete this training period, and were terminated between February 14 and March 2. In these circumstances, the Board properly found that these three replacements were not permanent replacements for strikers, but only temporary replacements. *Kansas Milling Co.*, 97 N.L.R.B. 219, 226 (1951). The Company's failure to reinstate the strikers whose positions they had vacated was unlawful. *NLRB v. Marydale Products*, 5 Cir. 1963, 311 F.2d 890, *cert. denied*, 375 U.S. 817.

III.

The Company did reinstate two of the strikers, Robles and Villarreal, upon the departure of their permanent replacements. Ten days lated they were informed that because of a "new law" they would have to fill out application forms, would not be covered by insurance for 30 days, and would lose their seniority and vacation benefits. In short, they were treated as new employees. Failure to accord these two employees full and complete reinstatement was clearly discriminatory and unlawful.

IV.

Substantial evidence on the record as a whole supports the Board's findings that the Company had no valid basis for doubting the Union's majority status.

Prior to 1959, Congress provided in Section 9(c) (3) of the Labor Management Relations Act that "Employees on strike who are not entitled to reinstatement shall not be eligible to vote". Accordingly, the Board concluded that permanently replaced economic strikers were not to be considered as part of the bargaining unit when determining the Union's majority status. *Stoner Rubber Co. Inc.*, 123 N.L.R.B. 1440 (1959). In 1959, however, Congress amended Section 9(c) (3) of the Act to provide that

> Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under

> such regulations as the Board shall find are consistent with the purpose and provisions of this Act in any election conducted within twelve months after the commencement of the strike.

The Board has subsequently formulated several principles to determine voting eligibility. *See* NLRB Twenty-fifth Annual Report 47 (1960); Twenty-eighth Annual Report 54-55 (1963). But it has continued to exclude permanently replaced economic strikers from the bargaining unit when weighing an employer's good faith in doubting the Union's majority status. *See, e.g., Titan Metal Manufacturing Co.*, 135 N.L.R.B. 196 (1962).

The Board has seen fit in this case to reverse that policy and require inclusion of permanently replaced economic strikers in the bargaining unit when the Union's majority status is challenged. The Company contends that such a change in policy is tantamount to a "rule" with continued prospective effect and can only by accomplished by the Board in accordance with the requirements of the Administrative Procedure Act. The Company additionally contends that the Board's reversal of its prior holdings in this regard cannot retroactively change the good faith of the Company's refusal to bargain under the law as it existed at that time. In *American Machinery v. NLRB* this Court disposed of a similar contention:

> We subscribe to the views expressed by Judge Friendly in N.L.R.B. v. A.P.W. Prods. Co., 2 Cir. 1963, 316 F.2d 899, 905:
>
> [W]hen an administrative agency makes law as a legislature would, it must follow the rule-making procedure . . . and when it makes law as a court would, it must follow the adjudicative procedure . . . whether to use one method of law making or the other is a question of judgment, not of power.
>
> In most situations an administrative agency must be allowed some flexibility in deciding whether adjudication or rule-making is the proper course to pursue. The

long shadows of *Fleetwood* and *Laidlaw* presaged the Board's decision in this case. We cannot say here the Board abused its discretion or violated the Administrative Procedure Act.

American Machinery, supra at .

As stated in *Securities and Exchange Comm. v. Chenery Corp.*, 332 U.S. 194, ". . . such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles". 332 U.S. at 203. Section 9(c) (3) of the Act demonstrates a congressional desire that economic strikers not entitled to reinstatement be permitted to vote in an election. Since the Board has carried out that desire, *see W. Wilton Wood, Inc.*, 127 N.L.R.B. 1675; NLRB Twenty-fifth Annual Report 47 (1960); Twenty-eighth Annual Report 54-55 (1963), logic requires that such employees also be included in the unit when determining whether the Union continues to enjoy majority status. In both cases, the question is which employees are properly part of the bargaining unit. Section 2(3) of the Act, moreover, provides that the term "employee" shall include "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute . . . and who has not obtained any other regular and substantially equivalent employment. . . . As a result of this provision and the Supreme Court's *Fleetwood* decision, *Laidlaw* and our decision in *American Machinery* teach that permanently replaced strikers retain an expectation of future employment until they have surrendered their interests. Thus, it is appropriate to include them in the bargaining unit. We conclude that to deny enforcement of the Board's order to bargain in good faith would be to say that the Board lacks the power to enforce the standards of the Act in an adjudicatory proceeding.

In this case, requiring the Company to bargain with the Union upon request for a reasonable period of time will not unduly burden the Company. At the same time, it is the only

remedy which can restore the *status quo ante*, and dissipate the effects of the Company's unlawful withdrawal of recognition from the Union. Thus, whether or not the Company in good faith relied on earlier Board decisions, the Board drew the proper balance, and its bargaining order should be enforced.

The petition to review is DENIED. The Board order is ENFORCED in full.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

C. H. GUENTHER & SON, INC.,
d/b/a PIONEER FLOUR MILLS,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 27495

JUDGMENT

Before: WISDOM, GOLDBERG and INGRAHAM, *Circuit Judges.*

THIS CAUSE came on to be heard upon the petition to review, and on a cross-application for enforcement of, an order of the National Labor Relations Board dated March 18, 1969, as corrected by order September 30, 1969, against C. H. Guenther & Son, Inc., d/b/a Pioneer Flour Mills, its officers, agents, successors, and assigns. The Court heard argument of respective counsel on March 4, 1970, and has considered the briefs and transcript of record filed in this cause. On June 1, 1970, the Court being fully advised in the premises, handed down its opinion denying the petition to review and granting enforcement of the Board's order as corrected.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced and that C. H. Guenther & Son, Inc., d/b/a Pioneer Flour Mills, its officers, agents, successors, and assigns, abide by and perform the directions of the Board in the said order contained.

Entered: June 23, 1970

APPENDIX C

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et. seq.*) are as follows:

Sec. 2. When used in this Act—

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment * * *.

Sec. 8(a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

* * * * * * * * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * * * * * * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

Sec. 9(a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. * * *

* * * * * * * * * * *

(c)(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike

who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.